UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRD REGION

THE RESEARCH FOUNDATION OF THE STATE UNIVERSITY OF NEW YORK OFFICE OF SPONSORED PROGRAMS

Employer

and

Cases 3-RC-11184 3-RC-11313 3-RC-11410

LOCAL 1104, COMMUNICATION WORKERS OF AMERICA, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND ORDER

Introduction

In Cases 3-RC-11184, 3-RC-11313 and 3-RC-11410 the Region previously found that certain research project assistants ("RPAs") employed by the Employer at its Albany, Buffalo and Syracuse, New York facilities were employees within the meaning of Section 2(3) of the Act. In making this determination, the Region relied upon *New York University*, 332 NLRB 1205 (2000), which was then controlling precedent. Subsequently, in *Brown University*, 342 NLRB No. 42 (July 13, 2004), the Board reversed *New York University* and remanded the instant cases to the Region for further consideration. Based upon the Board's holding in *Brown University*, I now conclude that the RPAs at issue herein are not employees within the meaning of Section 2(3) of the Act.

Procedural History

On March 13, 2002, the former Regional Director issued a Decision and Direction of Election in Case 3-RC-11184, finding that RPAs employed by the Employer at its Albany, New York facility were employees within the meaning of Section 2(3) of the Act and directed an election in a bargaining unit consisting of the Albany RPAs. On April 17, 2002, an election was conducted in that case and the resulting ballots were impounded. On October 16, 2002, the Board granted the Employer's Request for Review of the Decision in Case 3-RC-11184.

On April 11, 2003, the Acting Regional Director issued a Decision and Direction of Election in Case 3-RC-11313, finding that RPAs employed by the Employer at its Buffalo, New York facility were employees within the meaning of Section 2(3) of the Act and directed an election in a bargaining unit consisting of the Buffalo RPAs. On May 7, 2003, the Board granted the Employer's Request for Review of the Decision in Case 3-RC-11313. On May 8, 2003, an election was conducted in that case and the resulting ballots were impounded.

On March 15, 2004, the Acting Regional Director issued a Decision and Direction of Election in Case 3-RC-11410, finding that RPAs and research support specialists ("RSSs") employed by the Employer at its Syracuse, New York facility were employees within the meaning of Section 2(3) of the Act and directed an election in a bargaining unit consisting of the Syracuse RPAs and RSSs. On April 15, 2004, the Board granted the Employer's Request for Review of the Decision in Case 3-RC-11410. On April 16, 2004, an election was conducted in that case and the resulting ballots were impounded.

On July 16, 2004, the Board remanded Cases 3-RC-11184, 3-RC-11313 and 3-RC-11410 to the Region for reconsideration, in light of its decision in *Brown University*, in which it found that graduate student assistants were not employees within the meaning of Section 2(3) of the

Act. As stated, the Board in *Brown University* reversed *New York University*, the primary case that the Region relied on in its prior determination in these matters.

On July 23, 2004, the Region issued a Notice to Show Cause to the parties, which requested argument concerning why the instant petitions should not be dismissed, in view of the Board's decision in *Brown University*. In response to the Notice to Show Cause, the parties herein filed briefs addressing the impact of *Brown University* on the instant cases. On November 23, 2004, the Region issued an Order Consolidating Cases, Reopening the Record and Scheduling Hearing in the instant cases. In lieu of adducing testimony at the hearing, the parties tendered a joint stipulation of facts discussed below. Supplemental briefs, as well as briefs replying to the Region's Notice to Show Cause Order, were filed by the Employer and Petitioner and have been duly considered.

Parties' positions

The Petitioner contends that the relationship between the RPAs and the Employer at its Albany, Buffalo and Syracuse facilities is primarily economic, not educational. Thus, the Petitioner asserts that the RPAs are employees within the meaning of Section 2(3) of the Act. The Employer asserts that the relationship between the RPAs and Employer is primarily educational and thus, in accordance with *Brown University*, the RPAs are not employees within the meaning of Section 2(3) of the Act.

Stipulated Facts

In 1977, the Employer and the State University of New York ("SUNY") entered into an agreement that, in pertinent part, formally assigned management and responsibility over sponsored research programs to the Employer. The Employer, unlike SUNY, is a private corporation that is not subject to government civil service requirements. The Employer does not

receive any direct tax-levy funds from any appropriating authority or political subdivision, while SUNY operates primarily with publicly appropriated funds. The Employer's corporate budget is not subject to approval by SUNY or any government agency.

The appointment and removal of the Employer's Board of Directors is governed by its corporate bylaws, without reference to any other statute or law.¹ The Employer's Board members, whether employed by SUNY or not, serve on the Board in a private capacity and their employment with SUNY is merely incidental to Board membership. The Employer's management, including its human resource function, is independent from SUNY.

The parties stipulated that the National Labor Relations Board has statutory jurisdiction over the Employer. The Employer and SUNY are not joint employers of the RPAs and RSSs at issue herein. The Employer does not make any direct payments to SUNY to fund the tuition of the RPAs. However, the stipend received by RPAs from their work for the Employer impacts upon students' financial aid packages from SUNY because the needs assessments conducted to determine financial aid consider the students' income during the prior year, derived from any source, including employment by the Employer. SUNY at Buffalo lists on its web-site entitled, "Financial Support Opportunities for Graduate and Professional Students at the State University at Buffalo," various types of "assistanceships." Among the assistanceships listed are research assistanceships, including RPAs appointed by the Employer.

¹ The Employer's Board of Directors is composed of the Chancellor or Executive Vice Chancellor of SUNY as the Chair, ex officio, and 15 members of whom not more than one shall be a member of the SUNY Board of Trustees, not more than four shall be SUNY faculty members, not more than five shall be SUNY campus administrators, not more than one shall be a member of SUNY System Administration, and not more than four shall be individuals not employed by SUNY or the Employer.

Summary of Applicable Record Evidence

RPAs are SUNY graduate students, who perform academic research for the Employer. The RPA job description requires that: RPAs be enrolled as full-time SUNY students; RPA duties bear a significant relationship to their SUNY academic pursuits; and that their RPA work advances their SUNY educational pursuits. Approximately 80 percent of the RPAs are doctoral candidates, while the remaining RPAs are pursuing lesser degrees.

RPAs are supervised by the principal investigators ("PIs"). PIs are employed by the Employer but also typically are professors who also serve as the RPAs' advisers for their dissertation at SUNY. RPAs are assigned diverse duties. They collect and analyze data, draft reports and design studies within the framework of the research grant and the PIs' instructions. They often study a specific discipline in a library setting for many months before actually performing "hands-on" duties. RPAs also perform mundane tasks such as cleaning or setting up a lab. The RPA job description provides:

Activities will vary in terms of involvement and may be carried out in the laboratory, library, or in field studies. Activities may include assisting in the organizing and conduct of a research plan, developing methods of research, tests, and data collection, or making judgments through observation, interviews, and review of documents. Incumbents may also analyze and evaluate data, write reports or collaborate with research workers in other disciplines as required....

Although there are some exceptions, RPAs' service for the Employer generally advances their SUNY dissertation efforts in some fashion. RPAs are unconditionally allowed to use the research data that they assemble during their employment for academic purposes. RPAs often use such data and analysis to prepare a portion of their SUNY dissertations. Additionally, RPAs typically apply research skills and techniques acquired during their employment to advance their dissertation efforts.

PIs supervise RPAs by assigning duties that are connected to the research grant. PIs generally exercise more control over RPAs when they are novices and less control as they acquire experience. However, they may discharge RPAs at any time, for they are employees at-will.

On occasion, the funding for one of the Employer's research projects lapses prior to the project's completion, which results in the premature discharge of the project's RPAs. Under such circumstances, the affected RPAs may continue to work on the research project on an unpaid and voluntary basis. RPAs have a broad salary range and may earn anywhere from \$15,000 to \$150,000 per year, although typically the grants range between \$15,000 and \$30,000 per year. The RPAs are formally assigned to work 20 hours per week and although they may work longer hours, they do not receive additional compensation when they do so. While RPAs are offered tuition assistance, health, dental, vision and drug coverage and a dependent care flexible spending account, they do not receive other benefits, including vacations, holidays, sick leave, retirement, long term disability and life insurance benefits.

The RSSs are employed solely by the Employer's at its Syracuse facility.² There are 14 full-time and 2 part-time RSSs. Unlike RPAs, RSSs are not required to be SUNY students and typically are not completing SUNY dissertations. RSS jobs are generally short-term opportunities. However, irrespective of the term of their initial appointment, some RSSs have their appointments renewed and may remain employed for multiple consecutive years.

RSS compensation ranges from approximately \$19,000 to \$30,000 per calendar year. The Employer deducts federal and state income taxes, as well as F.I.C.A., from RSSs' wages.

RSSs receive broader benefits than those offered to RPAs. RSSs receive health care, dental, vision, prescription drug, dependent care, flexible spending program, vacation, holiday, sick leave, retirement, long-term disability, life insurance and tuition assistance benefits. RSSs' health benefits are valued at a higher percentage of their total compensation package than those offered to RPAs.

RSSs are assigned diverse duties. Similar to RPAs, RSSs collect and analyze data, draft and prepare reports, and conduct studies within the framework of a research grant. RSSs perform a great deal of "hands on" work, including data collection at rural field locations; repairing, transferring and maintaining equipment; preparing and maintaining vessels for upcoming tasks; operating farm equipment and vehicles; caring for vegetation or specimens being studied; or varied secretarial duties. RSSs often perform such duties alongside, or in tandem with, RPAs.

The RSS job description describes their diverse duties:

Incumbents carry out assignments that entail specialized training and experience in operating equipment, carrying out test procedures, and using special methods for data collation and interpretation....

Requires fundamental knowledge of scientific, medical or other disciplinary terminology and associated mathematical competence usually demonstrated by a bachelor's degree....

Requires the use of specialized techniques in the field of endeavor to make observations, collect data, use survey instruments and techniques, and make related calculations using mathematical formulae....

Incumbents operate and make decisions within defined test of analytical protocols, relying on the experience and direction of research scientists for carrying out more complex analytical tasks....

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² The parties stipulated that the RSSs are employees under Section 2(3) of the Act.

RSSs possess diverse backgrounds. Thus, while some RSSs hold graduate or advanced degrees, other RSSs may only hold bachelor's degrees. A given RSS's educational background and experience is generally matched with the needs of the research project to which the RSS is assigned. However, unlike their RPA counterparts, who must be SUNY students, and are mostly pursuing doctoral degrees and completing dissertations, RSSs are typically not students and are not pursuing doctoral degrees. There is no requirement that an RSS be enrolled as a SUNY student.

PIs supervise RSSs. PIs can discharge RSSs at will. RSSs work either a full-time schedule of 40 hours per week or a part-time schedule of 20 hours per week. Full-time RSSs typically work Monday through Friday.

Analysis

As discussed above, prior to the Board's remand of Cases 3-RC-11184, 3-RC-11313 and 3-RC-11410, the former Regional Director and Acting Regional Directors had concluded that the RPAs employed at the Employer's Albany, Buffalo and Syracuse, New York facilities were employees within the meaning of Section 2(3) of the Act. These conclusions were based on the Board's decision in *New York University*, 332 NLRB 1205 (2000), which was then controlling precedent. In *New York University*, the Board held that: the term "employee" was meant to be construed expansively; the term "employee" should be analyzed in accordance with common law master-servant principles; and because Section 2(3) of the Act fails to expressly exclude "students" from its definition of employees, graduate student assistants were necessarily statutory employees.

In *Brown University*, 342 NLRB No. 42 (July 13, 2004), the Board overruled *New York University*. *Brown University* rejected *New York University*'s broad construction of the term

"employee" and found that the Act's failure to expressly exclude "students" does not automatically render such students employees. Specifically, the Board stated:

[T]he Act is designed to cover economic relationships. The Board's longstanding rule that it will not assert jurisdiction over relationships that are "primarily educational" is consistent with these principles.

We emphasize the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship. Even students who have finished their coursework and are writing their dissertation must be enrolled to receive these awards. Further, students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student. Also, as shown below, their service as a graduate student assistant is part and parcel of the core elements of the Ph.D. degree. Because they are first and foremost students, and their status as a graduate student assistant is contingent on their continued enrollment as students, we find that that they are primarily students....

The evidence demonstrates that the relationship between Brown's graduate student assistants and Brown is primarily educational.

Id., slip op. at 6.

In *Brown University*, the Board concluded that graduate student assistants had a relationship with the university that was primarily educational because: graduate student assistants were enrolled at the university as a condition of their employment; graduate student assistants spent a limited number of hours performing their duties; and in order to receive their graduate degrees, graduate students had to serve as graduate student assistants. *Id.*, slip op. at 10. The Board further noted that while some graduate student assistants may technically satisfy the Act's literal "employee" definition, it would nevertheless contradict the Act's overriding principles to treat them as such. *Id.* Thus, the Board concluded that, "the imposition of collective bargaining on graduate students would improperly intrude on the educational process and would be inconsistent with the purposes and policies of the Act." *Id.*, slip op. at 11.

Based upon *Brown University*, I conclude that the RPAs are not employees under the Act because they are equivalent to *Brown University's* graduate student assistants. RPAs, like the graduate students in *Brown University*, also have a relationship with the Employer that is fundamentally educational, as opposed to being fundamentally economic. The following facts are illustrative. The RPA job description requires: RPAs to be enrolled as SUNY students; that RPAs' work assignments be related to their educational pursuits; and that RPAs' work facilitates the fulfillment of their SUNY academic requirements. RPAs, who have finished their SUNY coursework and are writing their dissertations, must be continuously enrolled as SUNY students in order to continue their RPA tenure. RPAs' primary goal is the attainment of their SUNY degree and their tenure ends once they obtain their SUNY degree. RPAs' work for the Employer often has a close and direct relationship to the completion of their SUNY dissertations. An RPA's PI often simultaneously serves as that RPA's SUNY dissertation adviser. In sum, and in accord with *Brown University*, the RPAs' relationship with the Employer relates fundamentally to their SUNY academic pursuits.

While the Employer, unlike the institution in *Brown University*, does not confer degrees upon its RPAs, RPAs nevertheless have a fundamentally academic relationship with the Employer. Although the Employer is not an educational institution that confers degrees, RPAs are required to be SUNY students. They perform work that bears a substantial relationship to their dissertations, and end their RPA careers once they receive their SUNY degrees. As the Board stated in *Brown University*, "[w]e emphasize the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA or proctorship." 342 NLRB No. 42, slip op. at 6.

Unlike the RPAs, no party herein disputes that the Syracuse RSSs are employees within the meaning of Section 2(3) of the Act. RSSs do not have a relationship with the Employer that is fundamentally academic. RSSs are not required to be SUNY students. RSSs are generally not completing a SUNY degree or dissertation and generally do not utilize their employment with the Employer to advance a formal academic goal at SUNY. *Brown University*, supra. As a result, RSSs remain employees within the meaning of Section 2(3) of the Act.

The parties agree, and I find, based on the record as a whole, that even if the RPAs are not employees within the meaning of Section 2(3) of the Act, a unit consisting of the RSSs alone nevertheless constitutes an appropriate unit. Furthermore, Petitioner has indicated that it is willing to represent a unit comprised solely of RSSs. The Employer has indicated that a unit comprised solely of RSSs is an appropriate unit, as it urges the Regional Director to open and count the ballots of the RSSs and to exclude the RPAs from the petitioned-for unit.

Order and Conclusion

As the unit requested by Petitioner in Case 3-RC-11184 is exclusively comprised of RPAs, who are not employees within the meaning of Section 2(3) of the Act, **IT IS HEREBY**ORDERED that the petition in this case be, and it hereby is, dismissed.

As the unit requested by Petitioner in Case 3-RC-11313 is exclusively comprised of RPAs, who are not employees within the meaning of Section 2(3) of the Act, **IT IS FURTHER**ORDERED that the petition in this case be, and it hereby is, dismissed.

As the unit requested by Petitioner in Case 3-RC-11410 is comprised of RPAs, who I now conclude are not employees within the meaning of Section 2(3) of the Act, and RSSs, who are employees within the meaning of Section 2(3) of the Act, the Decision and Direction of

Election in that case is hereby modified to exclude the RPAs from the unit found appropriate therein.

Appropriate Unit – Case 3-RC-11410

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time research support specialists employed by the Employer at its Syracuse, New York facility; excluding all research project assistants, confidential employees and guards, and all supervisors as defined in the Act.

There are approximately 16 employees in the bargaining unit found appropriate herein.

Opening and Counting of Impounded Ballots

The ballots cast in Case 3-RC-11410 by the RSSs employed at the Employer's Syracuse, New York facility, which were previously impounded, shall be opened and counted at a time to and date to be determined following the expiration of the date on which a request for review of this Supplemental Decision and Order is due to be filed with the National Labor Relations Board in Washington, D.C., or, as appropriate, upon final action taken by the Board on any request for review filed with respect to this Supplement Decision and Order. The count shall take place at the National Labor Relations Board, Region 3, Thaddeus J. Dulski Federal Building, 111 West Huron Street, Room 901, Buffalo, New York 14202-2387.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **March 28, 2005**.

DATED at Buffalo, New York this 14th of March 2005.

RHONDA P. ALIOUAT, Acting Regional Director National Labor Relations Board – Region 3 Thaddeus J. Dulski Federal Building 111 West Huron Street - Room 901 Buffalo, New York 14202